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## IN RE LENG BEE BEE; APPLICANT

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[ORIGINATING SUMMONS NO: 24NCC-177-05-2015]
5 MAY 2015

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***COMPANY LAW:*** *Winding up – Voluntary winding up – Winding up affairs of vendor – Leave of court – Liquidator's application – Sale of property by vendor – Whether property transferred to purchaser – Failure to complete registration of property under National Land Code – Whether liquidator duty bound to inform winding up court about status of transfer of property – Whether vendor's affairs fully wound up – Disposal of property – Whether liquidator took reasonable steps to ensure completion of transaction – Whether application dismissed with liberty to apply once vendor's affairs had been fully wound up – Companies Act 1965, ss. 263, 269, 272, 274 & 277*

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***CIVIL PROCEDURE:*** *Costs – Voluntary winding up of company – Winding up affairs of vendor – Leave of court – Liquidator's application – Sale of property by vendor – Whether property transferred to purchaser – Financier's excessive delay in executing transfer form – Whether winding up court may make such order as it thinks just – Whether financier bore costs of application – Companies Act 1965, s. 274*

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The vendor was a real property development company which was resolved to be wound up voluntarily. The liquidator ('applicant') discovered that five lots of land had been sold by the vendor but the transfer of the titles of those lands were yet to be registered in the names of the purchasers under the National Land Code ('NLC'). Despite all reasonable efforts, the liquidator was not able to locate the purchasers in question to execute the Form 14A as prescribed under s. 215(1) of the NLC. The liquidator had applied for and obtained a court order ('winding up court order') dated 28 May 2013 for the power to execute the Form 14A on behalf of the vendor. Two purchasers had executed the Forms 14A. The liquidator's solicitors had contacted the purchasers of lots 41 and 42 but the purchaser for lot 39 could not be contacted. Further, the facts revealed that Bank Muamalat Malaysia Bhd ('BMMB'), *ie*, the financier for the purchase of lots 39 and 42 had been guilty of excessive delay in executing the Form 14A. *Vide* this application, the liquidator applied for leave of the winding up court to wind up the affairs of the vendor even though the transfers had not been registered under the NLC and to call for a general meeting of the vendor under s. 272 of the Companies Act 1965 ('the Act') after the expiry of two months from the date of the order.

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**Held (dismissing application with liberty to apply as the liquidator sees fit after the vendor's affairs had been fully wound up):**

**(1)** This application was properly made and leave of the winding up court was required. Section 277 of the Act applies to members' voluntary winding up and the liquidator should observe the requirements of the court. On the facts, the winding up court order dated 28 May 2013 required the liquidator to inform the court in relation to the status of the transfers of the five lots. Such a requirement fell within the meaning of the phrase "the requirements of the court" in s. 277(2). If the liquidator was unable to register the transfer of the three lots, the liquidator was duty bound to inform the winding up court of such a fact. It was also incumbent on the liquidator to apply for the winding up court's leave to call for the final meeting despite the fact that the transfer of the three lots could not be registered. (para 15)

**(2)** Leave of the winding up court can only be given if the vendor's affairs are fully wound up and the vendor's property has been disposed of as required by s. 272(1) of the Act. On the facts, the vendor's legal title to the three lots has yet to be transferred to the purchasers as required under ss. 206(1)(b) and 215(2) of the NLC. If the three purchasers did not execute the Forms 14A and if the banks did not exercise their power to execute the Forms 14A on behalf of the three purchasers, the liquidator may file a suit against the said purchasers ('the liquidator's suit'). Among the remedies that could be sought were: (i) an order of specific performance for the three sale and purchase agreements in relation to the three lots; (ii) a mandatory injunction to direct the three purchasers to execute the Forms 14A; and (iii) the registrar of titles or land administrator, as the case may be for the three lots, can be directed by the court hearing the liquidator's suit to register the transfers of the said lots pursuant to s. 417(1) of the NLC. (para 16)

**(3)** Under s. 269(1)(b) of the Act, a liquidator in a members' voluntary winding up may exercise any of the powers provided by the Act to a liquidator in a winding up by the court. Based on s. 263(2)(a), the liquidator may file the liquidator's suit without leave of the winding up court. The said suit may be filed as long as the vendor has not been dissolved under s. 272(5). On the facts, since the vendor had not been dissolved within the meaning of s. 272(5), the liquidator's suit may be filed. As such, this application was dismissed so that the liquidator's suit could be filed in order to ensure the registration of the transfer of the three lots. (para 17)

**(4)** In dismissing this application, the liquidator was given liberty to apply for the winding up court's leave to wind up the vendor's affairs and to call for the final meeting ('liberty to apply'). This is because (i) the liquidator's suit may be subsequently filed and all the appropriate orders may be successfully obtained to register the transfer of the three lots; or (ii) the banks may subsequently exercise their power to execute

A the Form 14A for the three lots on behalf of the purchasers. If either one of those possibilities occurred, the liquidator was duty bound to re-apply expeditiously for leave of the winding up court to wind up the vendor's affairs and to call for the final meeting. (paras 18 & 19)

B **(5)** The liquidator was given the liberty to apply in order to avoid the following complications, *ie*: (i) there will be no application of the issue estoppel doctrine (part of the *res judicata* doctrine) to bar any subsequent application by the liquidator; and (ii) the winding up court was not *functus officio* despite the perfection of this court's order in dismissing this application. As such, there will be no bar to any C subsequent application by the liquidator based on the *functus officio* doctrine. This application was dismissed with liberty to the liquidator to apply as the liquidator sees fit after all the vendor's affairs had been fully wound up. (paras 19 & 26)

D **(6)** In respect of costs for this application, rr. 165 to 174 of the Companies (Winding-up) Rules 1972 ('the Rules') did not apply. The Rules was silent on the question of costs of an application to the winding up court by a liquidator in a members' voluntary winding up. Section 274 of the Act, however, applies in respect of the winding up court's power to award costs in respect of this application. This application fell within E s. 274(1)(a) since it sought, *inter alia*, the winding up court's determination on a question as to whether the court may grant leave to the liquidator to wind up the vendor's affairs. Under s. 274(2), the winding up court may make such other order on the application as it thinks just. It was only just that the costs of this application be borne F by BMMB due to its excessive delay in executing the Form 14A in respect of lots 39 and 42. The sum of RM5,000 was awarded as costs of this application to be paid by BMMB to the liquidator. (paras 22-26)

**Case(s) referred to:**

*Asia Commercial Finance (M) Bhd lwn Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC* ***(refd)***

G *Hassan Seman & Ors v. Jusoh Awang Kechik [1982] CLJ 109; [1982] CLJ (Rep) 110 FC* ***(refd)***

*Mosbert Bhd (in liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC* ***(refd)***

*Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat & Anor [1992] 4 CLJ 1882; [1992] 3 CLJ (Rep) 281 HC* ***(refd)***

H *Seagate Technology Pte Ltd & Anor v. Goh Han Kim [1995] 1 SLR 17* ***(refd)***

*Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC* ***(refd)***

*Sungei Biak Tin Mines Ltd v. Saw Choo Theng & Anor (No 2) [1970] 1 LNS 150 FC* ***(refd)***

*Takako Sakao v. Ng Pek Yuen & Anor (No 2) [2010] 1 CLJ 419 FC* ***(refd)***

*Tan Soo Bing & Ors v. Tan Kooi Fook [1997] 1 CLJ 556 FC* ***(refd)***

I *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 2 CLJ 146 SC* ***(refd)***

*Tan Suan Sim v. Chang Fook Shen [1980] 1 LNS 75 FC* ***(refd)***

*Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC* ***(refd)***

**Legislation referred to:**

Companies Act 1965, ss. 7(1), 236(2)(a), 257(1), 269(1)(b), 272(1), (3), (5), 274(1)(a), (2), 277(2)

Companies (Winding-up) Rules 1972, rr. 165, 166, 167, 168, 169, 170, 171, 172, 174

National Land Code, ss. 206(1)(b), 215(1), (2), 242(1), 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 417(1)

Specific Relief Act 1950, s. 11(1), (2)

Companies Act [Sing], ss. 272, 308

*For the applicant - Tee Boon Cheong; M/s Tee Boon Cheong & Co*
*For Bank Muamalat Malaysia Bhd - Jason Singh; M/s Jason Singh & Rakan-rakan*

*Reported by Kumitha Abd Majid*

## JUDGMENT

**Wong Kian Kheong JC:**

### Introduction

**[1]** This is a curious case of a real property development company (vendor) which has resolved to be wound up voluntarily (not due to insolvency). After the vendor's liquidator (liquidator) had been appointed, the liquidator discovered that certain pieces of land had been sold by the vendor to purchasers but the transfers of titles of such land had yet to be registered in the names of the purchasers under the National Land Code (NLC). The peculiar feature of this case is that despite all reasonable efforts, the liquidator is not able to get the purchasers in question to execute Form 14A, the instrument of transfer of land prescribed by s. 215(1) NLC (Form 14A). The liquidator has now applied for leave of the winding up court to wind up the affairs of the vendor even though the transfers have not been registered under NLC.

### Brief Facts

**[2]** The vendor sold, among others, five lots of land (five lots) to five purchasers in 2004 and 2005 (five purchasers).

**[3]** On 14 April 2010, all the directors of the vendor (vendor's directors) made the following declaration in Form 66 of the second schedule to the Companies Regulations 1966 (Form 66):

(a) the vendor's directors had inquired into the affairs of the vendor; and

(b) at a meeting of the vendor's directors, the vendor's directors had formed the opinion that the vendor would be able to pay in full the vendor's debts within a period of two months from the commencement

of the voluntary winding up of the vendor. It is to be noted that s. 257(1) of the Companies Act 1965 (CA) provides, among others, that before the company directors propose to wind up the company voluntarily, the company's directors should inquire into the company's affairs and should form an opinion that the company would be able to pay the company's debts within 12 months after the commencement of voluntary winding up.

**[4]** Attached to Form 66 was a statement of the vendor's assets and liabilities as at 31 March 2010 (vendor's statement of assets and liabilities). The vendor's statement of assets and liabilities showed that the vendor had assets of an estimated realisable value of RM834,078.81 and liabilities amounting to only RM47,497.75, namely the vendor had an estimated surplus of RM786,581.06 after paying in full all the debts of the vendor.

**[5]** The vendor held an extraordinary general meeting of its shareholders on 31 May 2010 (EGM). At the EGM, the vendor's shareholders passed, among others, a special resolution for the voluntary winding up of the vendor and the appointment of the liquidator. The vendor's voluntary winding up is one by its members, in contradistinction with a creditors' voluntary winding up.

**[6]** After the appointment of the liquidator, the liquidator discovered that although the purchase price of the five lots had been paid in full to the vendor, the titles to the five lots remained in the vendor's name and had not been transferred to the five purchasers.

**[7]** On 12 May 2012, the liquidator applied to this winding up court in an *ex parte* originating summons for, among others, an order that the liquidator be given the power to sign Forms 14A on the vendor's behalf in respect of the five lots. This application was granted by this winding up court on 28 May 2013 (winding up court order dated 28 May 2013). It is pertinent to note that the winding up court order dated 28 May 2013 requires the liquidator to report to the winding up court in respect of the status of the transfer of the five lots.

**[8]** Pursuant to the winding up court order dated 28 May 2013:

(a) The liquidator had signed Forms 14A on the vendor's behalf for all the five lots;

(b) Two Forms 14A had been executed by two of the five purchasers and had been registered under the NLC;

(c) The liquidator's solicitors, Messrs Tee Boon Cheong & Co (liquidator's solicitors) had contacted the purchasers of two of the five lots, namely lots No. 41 (Lot 41) and 42 (Lot 42), but these purchasers had not signed Forms 14A;

(d) The liquidator's solicitors could not contact the purchaser for lot No. 39 (Lot 39); and

(e) The liquidator's solicitors wrote to the following financiers for the purchase of Lots 39, 41 and 42 (three lots):

(i) Bank Muamalat Malaysia Bhd (BMMB), the financier for the purchase of Lots 39 and 42; and

(ii) CIMB Bank Bhd (CIMB), the financier for the purchase of Lot 41.

The liquidator's solicitors wrote to BMMB and CIMB (collectively referred herein as the 'banks') to propose the exercise of the banks' power under the powers of attorney (PA's) granted to the banks by the purchasers of the three lots (three purchasers), to execute Forms 14A on behalf of the three purchasers. The following letters had been exchanged:

(i) letter dated 26 March 2014 from the liquidator's solicitors to BMMB;

(ii) letter dated 2 April 2014 from the liquidator's solicitors to CIMB;

(iii) letter dated 19 August 2014 from BMMB's solicitors, Messrs Jason Singh & Rakan-rakan (BMMB's Solicitors), to the liquidator's solicitors;

(iv) letters dated 9 October 2014 and 26 October 2014 from the liquidator's solicitors to CIMB's solicitors, Messrs Amin-Tan & Co (CIMB's Solicitors);

(v) letter dated 28 October 2014 from the liquidator's solicitors to BMMB; and

(vi) letters dated 14 November 2014 and 9 December 2014 from CIMB's solicitors to the liquidator's solicitors.

**This Application**

**[9]** In court enclosure No. 11 (this application), the liquidator applies for leave of the winding up court to wind up the vendor's affairs and to call for a general meeting of the vendor under s. 272 CA after the expiry of two months from the date of the order (if granted in this application), irrespective of whether the transfer of three lots has been registered or not.

**[10]** This application is supported by documentary evidence adduced by the liquidator's solicitors to show all efforts by the liquidator's solicitors to:

(a) Contact the three purchasers; and

(b) Seek the co-operation of the banks and their solicitors to execute Forms 14A on behalf of the three purchasers by using the PA's in question.

**[11]** BMMB has filed an affidavit which opposes this application (BMMB's affidavit). According to BMMB's affidavit:

(a) BMMB has beneficial interest in Lots 39 and 42 as BMMB has financed the purchase of those two lots;

(b) The purchasers of Lots 39 and 42 have failed to sign Form 14A as well as the charge instruments in Form 16A as prescribed by s. 242(1) NLC;

(c) BMMB has executed Forms 14A and 16A;

(d) BMMB's delay is due to BMMB's delay in debiting the bank accounts of the purchasers of Lots 39 and 42 of all expenses incurred by BMMB in this case. In other words, BMMB's delay in this case is caused by BMMB's own internal process of charging all expenses to the purchasers of Lots 39 and 42; and

(e) BMMB applied for the vendor's winding up to be deferred for a further two months.

**Winding Up Court's Power In A Voluntary Winding Up**

**[12]** Sections 272 and 277 CA provide as follows:

Section 272. Final meeting and dissolution

(1) As soon as the affairs of the company are fully wound up the liquidator shall make up an account showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company, or in the case of a creditor's voluntary winding up a meeting of the company and the creditors, for the purpose of laying before it the account and giving any explanation thereof.

(2) The meeting shall be called by advertisement published in a newspaper circulating generally throughout Malaysia, which advertisement shall specify the time, place and object of the meeting and shall be published one month at least before the meeting.

(3) The liquidator shall, within seven days after the meeting, lodge with the Registrar and the Official Receiver a return of the holding of the meeting and of its date with a copy of the account attached to such return, and if the return or copy of the account is not so lodged the liquidator shall be guilty of an offence against this Act.

Penalty: One thousand ringgit. Default penalty

(4) The quorum at a meeting of the company shall be two and at a meeting of the company and the creditors shall be two members and two creditors and if a quorum is not present at the meeting, the liquidator shall *in lieu* of the return mentioned in subsection (3) lodge a return (with account attached) that the meeting was

duly summoned and that no quorum was present thereat, and upon such a return being lodged the provisions of subsection (3) as to the lodging of the return shall be deemed to have been complied with.

(5) **On the expiration of three months after the lodging of the return with the Registrar and with the Official Receiver the company shall be dissolved.**

(6) Notwithstanding subsection (5) the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(7) The person on whose application an order of the Court under this section is made shall, within fourteen days after the making of the order, lodge with the Registrar and with the Official Receiver an office copy of the order, and if he fails so to do he shall be guilty of an offence against this Act.

Penalty: One thousand ringgit. Default penalty

(8) If the liquidator fails to call a meeting as required by this section he shall be guilty of an offence against this Act.

Penalty: Two thousand ringgit. Default penalty.

Section 277. Books to be kept by liquidator

(1) Every liquidator shall keep proper books in which he shall cause to be made entries or minutes of proceedings at meetings and of such other matters as are prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect them.

**Control of Court over liquidators**

(2) *The Court shall take cognisance of the conduct of liquidators, and if a liquidator does not faithfully perform his duties and observe the prescribed requirements or the requirements of the Court or if any complaint is made to the Court by any creditor or contributory or by the Official Receiver in regard thereto, the Court shall inquire into the matter and take such action as it thinks fit.*

(3) The Registrar or the Official Receiver may report to the Court any matter which in his opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss which the estate of the company has sustained thereby and make such other order as it thinks fit.

(4) The Registrar or the Official Receiver may report to the Court any matter which in his opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss which the estate of the company has sustained thereby and make such other order as it thinks fit.

A Delivery of property to liquidator

(5) The Court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the liquidator or provisional liquidator forthwith or within such time as the Court directs any money, property, books and papers in his hands to which the company is *prima facie* entitled.

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(emphasis added).

**[13]** The purpose of this application is clear. The liquidator wishes to call for a general meeting of the vendor's shareholders (final meeting) to lay at the final meeting under s. 272(1) CA, an account prepared by the liquidator which shows:

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(a) how the vendor's voluntary winding up has been conducted by the liquidator; and

D (b) how the vendor's property has been disposed of by the liquidator

(liquidator's accounts).

Once the final meeting has approved the liquidator's accounts, s. 272(3) CA requires that within seven days after the final meeting, the liquidator shall lodge with the Registrar of Companies (ROC) (s. 7(1) CA provides that the Chief Executive Officer of the Companies Commission of Malaysia shall be the ROC) and the Official Receiver (OR) a return of the final meeting (return) and a copy of the liquidator's accounts. Section 272(5) CA provides that on the expiry of three months after the lodging of the return with the ROC and OR, the vendor shall be dissolved.

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**[14]** Section 272(1) CA does not expressly require leave of winding up court. The question that arises is whether the liquidator needs leave of the winding up court as prayed for in this application. I am not able to find any Malaysian case on this point. Nor am I able to unearth any similar case from Singapore, Australia, England and New Zealand which have similar legislation on members' voluntary winding up.

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**[15]** I am of the view that this application is properly made and leave of winding up court is required in this case for the following reasons:

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(a) Section 277 CA is placed in Division 4 of Part X of CA which is entitled "Provisions Applicable to Every Mode of Winding Up". Hence, s. 277 CA applies to a member voluntary winding up, such as in this case. Section 277(2) CA provides, among others, that a liquidator should "observe ... the requirements of the court"; and

I (b) the liquidator has applied for and obtained the winding up court order dated 28 May 2013 for the power to sign Form 14A for the five lots on behalf of the vendor. The winding up court order dated 28 May 2013

also requires the liquidator to inform the winding up court in respect of the status of the transfers of the five lots. Such a requirement of the winding up court dated 28 May 2013 falls within the meaning of the phrase "the requirements of the court" in s. 277(2) CA. Accordingly, if the liquidator is unable to register the transfer for the three lots, the liquidator is duty bound to inform the winding up court of such a fact and it is also incumbent on the liquidator to apply for the winding up court's leave to call the final meeting despite the fact that the transfer for the three lots cannot be registered. Hence, the necessity to make this application.

**This Application Cannot Be Allowed**

**[16]** I am satisfied that the liquidator has expended reasonable time, effort and expense through the liquidator's solicitors to trace and contact the three purchasers as well as the banks. Having said that, despite the spirited submission by learned counsel for the liquidator, Mr Tee Boon Cheong, I am unable to accede to this application due to two reasons as follows:

(a) leave of winding up court can only be given if the vendor's affairs "are fully wound up" and the vendor's property "has been disposed of" as required by s. 272(1) CA. The vendor's legal title to the three lots has yet to be transferred to the three purchasers as required by ss. 206(1)(b) and 215(2) NLC. Sections 206(1)(b) and 215(2) NLC read as follows:

s 206(1). Subject to the following provisions of this section:

(a) every dealing under this Act shall be effected by an instrument complying with the requirements of sections 207 to 212; and

(b) *no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen.*

s 215(2). *The title of the transferor shall pass to and vest in the transferee upon the registration of any such transfer, together also with the benefit of any registered interests then enjoyed with the land.*

(emphasis added).

Part 18 of NLC (ss. 292-318 NLC) concerns the process of registration of dealings in respect of land. Sections 206(1)(b) and 215(2) NLC are statutory facets of the Torrens system which has been embodied in our NLC. I cite the following judgment of the Federal Court given by Chang Min Tat FJ in *Tan Suan Sim v. Chang Fook Shen* [1980] 1 LNS 75; [1980] 2 MLJ 66, at 67:

It did not appear to have been sufficiently realised and the appellant was unfortunate in not realising for herself or in not obtaining the proper advice that *in the Torrens system of registration of titles, the property does not pass until the transfer has been effectively registered against the issue document of title in the relevant registry of titles*.

(emphasis added); and

(b) if the three purchasers do not execute Forms 14A and if the banks do not exercise their power under the PA's to execute Forms 14A on behalf of the three purchasers, the liquidator may file a suit against the three purchasers (liquidator's suit) in the High Court and apply for the following remedies:

(i) an order of specific performance of the three sale and purchase agreements for the three lots (SP order). The court hearing the liquidator's suit, has the discretionary power to grant the SP order under s. 11(1) of the Specific Relief Act 1950 (SRA). Section 11(2) SRA provides that unless the contrary is proved, "the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved". Section 11(2) SRA applies to sale and purchase of land, such as in this case. PS Gill J (as His Lordship then was) in the High Court, granted a specific performance order of a sale and purchase agreement of land in *Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat & Anor* [1992] 4 CLJ 1882; [1992] 3 CLJ (Rep) 281; [1992] 2 MLJ 68, at 84. The High Court's decision in Plenitude Holdings Sdn Bhd has been affirmed on appeal by the Supreme Court in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1993] 2 CLJ 146; [1993] 1 MLJ 113;

(ii) a mandatory injunction to direct the three purchasers to execute Form 14A (Mandatory Injunction);

(iii) if the three purchasers do not comply with the mandatory injunction, the court's Registrar is empowered to execute Form 14A for the three purchasers. In *Plenitude Holdings Sdn Bhd*, at p. 85, the High Court ordered that upon the payment of the balance purchase price by the purchasers/plaintiffs:

> *[the High Court's Senior Assistant Registrar] shall sign the transfer of the said land and the adjudication form and other relevant documents on behalf of the second defendant to convey a good title to the plaintiffs free from all encumbrances and shall forthwith deliver the said transfer, the said Grant 17259 and the said documents to the solicitors for the plaintiffs. The second defendant shall forthwith deliver vacant possession of the land to the plaintiffs on payment of the balance as aforesaid.*
>
> (emphasis added); and

(iv) the Registrar of Titles or land administrator, as the case may be for the three lots, can be directed by the court hearing the liquidator's suit to register the transfers of the three lots pursuant to s. 417(1) NLC. Section 417(1) NLC provides as follows:

417. *General authority of the Court*

(1) *The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgement or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith.*

(emphasis added).

The following appellate judgments illustrate the application of s. 417(1) NLC:

(1) Suffian FJ (as His Lordship then was) held as follows in *Sungei Biak Tin Mines Ltd v. Saw Choo Theng & Anor (No 2)* [1970] 1 LNS 150; [1970] 2 MLJ 226, at 227:

*Section 417 of the National Land Code clearly says that the court has power to direct the collector to do all such things as may be necessary to give effect to its judgment or order. If we did not order the collector to remove Mr. Lee's name from the register and put back on it that of the defendant company, we would be allowing the plaintiffs and Mr. Lee to thumb their noses at a judgment of the Federal Court, and I do not think that we should allow that. We should give effect to our judgment and order the collector to get Mr. Lee off the register and put the defendant company back on it.*

(emphasis added);

(2) in *Hassan Seman & Ors v. Jusoh Awang Kechik* [1982] CLJ 109; [1982] CLJ (Rep) 110; [1982] 1 MLJ 66, at p. 113 (CLJ); p. 67 (MLJ), Salleh Abas FJ (as His Lordship then was) delivered the following judgment of the Federal Court:

That the court has power to order correction of error under [s 417 NLC] was clearly expressed by this court in *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226, 227. In the National Land Code indefeasibility and correction of error are two independent provisions existing side by side. Each has its own sphere and scope of operation. The provision for correction of error is not even treated by the Code as an exception to indefeasibility provision. Thus correction of an error can never be a violation of the indefeasibility principle, and must remain outside the scope of the indefeasibility principle. The only care the Registrar of Title or the court making an order for correction should take is to determine that the mistake is a mere error and that it does not cease to be so and does not become something else. In the present case we are satisfied, just as the District Officer was, that the memorial made on the register of tide was an error and not something else. In the circumstances we consider it a proper case to order its correction.;

(3) the Supreme Court in a judgment given by Seah SCJ in *Mosbert Bhd (in liquidation) v. Stella D'Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446, at 448, decided as follows:

A In our opinion, [s 417(2) NLC] does not empower the High Court to make such an order. *The section is of limited application only and is intended to authorise the High Court to direct the Land Registrar to do all such things as may be necessary to give effect to any judgment or order made by the Court affecting the land*. It does not, in our judgment, give power to the Court to allow a defective or void private caveat to be amended by the
B caveator.

(emphasis added);

(4) in *Tan Soo Bing & Ors v. Tan Kooi Fook* [1997] 1 CLJ 556; [1996] 3 MLJ 547, at p. 562 (CLJ); p. 554 (MLJ), Wan Adnan FCJ (as His
C Lordship then was) delivered the following Federal Court's judgment:

In our view, the words '... be necessary to give effect to any judgment or order given or made in any proceedings' in s 417(1) are very important. These words limit the power of the court to give directions to the registrar. The court can only give directions to the registrar if such
D directions are necessary to give effect to any judgment or order of the court. There must first be a final judgment or order of the court. Then only, in order to give effect to such judgment or order, the court can give directions to the registrar.

(emphasis added); and

E (5) in *Takako Sakao v. Ng Pek Yuen & Anor (No 2)* [2010] 1 CLJ 419; [2010] 2 MLJ 181, at p. 424 (CLJ); p. 184 (MLJ) [Takako Sakao (No 2)], Gopal Sri Ram FCJ held as follows in the Federal Court:

*It is settled that this court has ample jurisdiction to make consequential orders to give effect to its judgment (see Tan Soo Bing & Ors v Tan Kooi Fook [1996] 3*
F *MLJ 547) including directing the entry of a registrar's caveat (see Seet Soh Ngoh v. Venkateswara Sdn Bhd & Anor [1976] 1 MLJ 242) and to ensure that its judgment in particular cases is not defeated by intervening events.*

(emphasis added).

It is to be noted that *Tan Soo Bing* and *Takako Sakao (No 2)* have been
G decided by the Federal Court as our highest court.

An example of the application of s. 417(1) NLC is *Plenitude Holdings Sdn Bhd*, at p. 85, where the High Court ordered that upon the payment of the balance purchase price:

H *The Registrar of Titles, Johore, and any other proper registering authority are hereby directed and ordered to register the said transfer forthwith in favour of the plaintiffs, Plenitude Holdings Sdn Bhd. as proprietors, free of all caveats, liens, charges, prohibitory orders, and other encumbrances.*

(emphasis added).

I

**[17]** I am of the following view regarding the liquidator's suit: A

(a) under s. 269(1)(b) CA, a liquidator in a members' voluntary winding up, may exercise any of the powers given by CA to a liquidator in a winding up by the court. In a winding up by the court, s. 236(2)(a) CA empowers a liquidator to bring an action "in the name and on behalf of the company". This is clear from the following Federal Court's judgments in *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785; [2010] 2 MLJ 749: B

(i) judgment of Zaki CJ, at p. 786 (CLJ); p. 755 (MLJ):

> An appointment of an advocate by a liquidator pursuant to s 236(2)(a) of the Companies Act does not require leave of the court because he clearly needs the services of an advocate to bring or defend a legal action.; and C

(ii) judgment of Gopal Sri Ram FCJ, at p. 795 and 796-797 (CLJ); p. 756 and 757-758 (MLJ): D

> *What appears to have been overlooked all round is the fundamental principle that once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. ...*
>
> For completeness there remains the question whether the learned judge was correct in holding that the liquidator in this case had to obtain leave of the court to appoint an advocate and solicitor to conduct the litigation. With respect I must express my disagreement. In my judgment, the correct view is that expressed by Abdul Aziz J in *Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam as the Receiver and Manager and liquidator of Selvam Holdings (M) Sdn Bhd & Anor* [1994] 4 CLJ 899 as follows: E F
>
> > The second point is that s 236(1)(e) does not apply to the appointment of an advocate and solicitor to defend a liquidator against a suit arising out of the performance of his duties as liquidator. Paragraph (e) of s 236(1) speaks of the appointment of an advocate by a liquidator 'to assist him in his duties'. In my opinion the duties envisaged are the ordinary administrative and management duties of a liquidator such as those that are within his ordinary professional competence. It is only that kind of duties that the word 'to assist' can comfortably go along with. G H
> >
> > When a liquidator is sued, as in this case, the liquidator has a problem which falls outside his professional competence as liquidator and for which he must engage an advocate and solicitor to represent him to resist the suit. The first respondent's duty to resist this application is not, in my opinion, one of a kind intended by the word 'duties' I

A in paragraph (e), and counsel acting for him in this case cannot be said to have been appointed by him 'to assist him in his duties'.

As to whether a liquidator's power to appoint an advocate to defend him falls under s 236(2)(a) or (i) is a secondary question. Paragraph (i) of s 236(2) - which gives power to 'appoint an agent to do any business which the liquidator is unable to do himself' - appears to be wide enough to enable liquidator to appoint an advocate and solicitor to defend him. If in defending this application the first respondent can be said to be doing so 'in the name and on behalf' of the applicant, I would decidedly say he had power, under paragraph (a) of s 236(2), to appoint an advocate and solicitor because to defend any action he must necessarily engage an advocate and solicitor.

*Whatever the position may be under s 236(2), as long as the first respondent is not caught by paragraph (e) of s 236(1) - and I do not think he is - he does not need to get the authority either of the court or of the committee of inspection to appoint an advocate and solicitor.*

*In short, a liquidator who wishes to appoint an advocate and solicitor to prosecute, continue or defend an action by or against the company in liquidation may do so under s 236(2)(a) without the leave of the court or the committee of inspection*.

(emphasis added).

Based on s. 236(2)(a) CA as authoritatively interpreted by the Federal Court in *Zaitun Marketing Sdn Bhd*, the liquidator may file the liquidator's suit without leave of the winding up court; and

(b) the liquidator's suit may be filed so long as the vendor has not been dissolved under s. 272(5) CA. I cite the Singapore Court of Appeal's judgment given by LP Thean JA in *Seagate Technology Pte Ltd & Anor v. Goh Han Kim* [1995] 1 SLR 17, as follows:

The respondent resisted the appeal on two other grounds. He contended that the winding up of the first appellant company had progressed to a very advanced stage and that the company has therefore been dissolved, and in consequence the action cannot be continued and this appeal cannot be maintained. We disagree with the respondent's contention. *It is settled law that it is only upon the final dissolution of a company that a cause of action vested in it ceases to exist: see Foster Yates & Thom v. HW Edgehill Equipment* [1978] 122 SJ 860. In this respect, the provisions of s 308 of the Companies Act (Cap 50, 1990 Ed) are pertinent. Section 308(1) states that as soon as all the affairs of the company are fully wound up the liquidator shall call a general meeting of the company for the purpose of laying the

> accounts to show how the winding up was conducted and to give any explanation thereof. Section 308(3) provides that within seven days after the meeting the liquidator shall lodge a return of the holding of the meeting with the Registrar of Companies and the Official Receiver. Section 308(5) then provides that on the expiration of three months after the lodging of the return with the registrar and the Official Receiver, 'the company shall be dissolved'. *Only when these requirements in s 308 are satisfied will a company have been finally dissolved*. There was no evidence that any of these events have taken place. The respondent points to the fact that the liquidators' account of receipts and payments and statement of the position in the winding up (Form 75), shows that a sum of $708,212 representing surplus assets had been paid to the contributories (the second appellants) on 27 September 1989. He points also to the liquidators' account of receipt and payment for the period 13 March 1993 to 12 September 1993 which discloses that no further receipts or payments were made after 27 September 1989. However, this is not enough to satisfy s 308 of the Companies Act. In fact, in a return filed as late as 11 October 1993, the liquidators state that there was a delay in the winding up because of the need to obtain tax clearance. *We are therefore of the view that the first appellants still exist and can maintain the action against the respondent through the liquidator who, by virtue of s 272(2) of the Companies Act, continues the action and this appeal in the name of the first appellant company*.
>
> (emphasis added).

It is to be noted that ss. 272 and 308 of the Singapore Companies Act referred to in *Seagate Technology Pte Ltd*, are in *pari materia* with our ss. 236 and 272 CA. Based on *Seagate Technology Pte Ltd*, since the vendor has not been dissolved within the meaning of s. 272(5) CA, the liquidator's suit may be filed. As explained in the above sub-para. 16(b), one of the two reasons why this application is dismissed, is that the liquidator's suit should be filed so as to ensure the registration of the transfer of the three lots.

**Liquidator Should Be Given Liberty To Apply**

**[18]** In dismissing this application, this court should give the liquidator liberty to apply for the winding up court's leave to wind up the vendor's affairs and to call for the final meeting (liberty to apply). This is because:

(a) the liquidator's suit may be subsequently filed and all the appropriate orders may be successfully obtained to register the transfer of the three lots; or

(b) the banks may subsequently exercise their power under the PA's to execute Form 14A for the three lots on behalf of the three purchasers.

**[19]** If either one of the possibilities stated in the above para. 18 occurs, the liquidator is duty bound to re-apply expeditiously for leave of the winding up court to wind up the vendor's affairs and to call for the final

meeting. I am giving the liquidator liberty to apply to avoid the following possible complication:

(a) there will be no application of the issue estoppel doctrine (part of the *res judicata* doctrine) to bar any subsequent application by the liquidator. This is because in *Asia Commercial Finance (M) Bhd lwn Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189, at 200, our Supreme Court in a judgment given by Peh Swee Chin FCJ, has recognised the wider application of the issue estoppel doctrine; and

(b) the winding up court is not *functus officio* despite the perfection of this court's order in dismissing this application. In *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1, at p. 699 (CLJ); p. 18 (MLJ), the Federal Court in a judgment given by Abdull Hamid Embong FCJ, held as follows:

> We conclude by saying that once a regularly obtained order or judgment has been perfected, the court is *functus officio*. The matter as decided *vide* encl 6 is thus *res judicata* and cannot be re-litigated.

There will be no bar to any subsequent application by the liquidator based on the *functus officio* doctrine.

**BMMB Should Bear Costs Of This Application**

**[20]** Despite dismissing this application, this court cannot be oblivious to the fact that BMMB has been guilty of excessive delay in executing Form 14A for Lots 39 and 42. BMMB's inordinate delay is clear from the following evidence:

(a) the liquidator's solicitors have sent the first letter dated 26 March 2014 to BMMB; and

(b) according to BMMB's affidavit, BMMB's delay is due to its own internal operation of charging all expenses in this case to the purchasers of Lots 39 and 42. BMMB's affidavit even applied for the vendor's winding up to be deferred for a further two months.

**[21]** Mr Jason Singh, BMMB's learned counsel, has tried his level best to dissuade me from imposing costs of this application on his client. As stated above, there is excessive delay on the part of BMMB in this case and the explanation given in BMMB's affidavit is, regrettably, not acceptable.

**[22]** In respect of costs of this application, rr. 165 to 174 of the Companies (Winding-up) Rules 1972 (WUR) do not apply. In fact, the WUR are silent on the question of costs of an application to the winding up court by a liquidator in a members' voluntary winding up.

**[23]** I am of the view that s. 274 CA applies in respect of the winding up court's power to award costs in respect of this application. Section 274 CA reads as follows:

Section 274. Application to Court to have questions determined or powers exercised

(1) The liquidator or any contributory or creditor may apply to the Court:

(a) to determine any question arising in the winding up of a company; or

(b) to exercise all or any of the powers which the Court might exercise if the company were being wound up by the Court.

(2) The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.

(emphasis added).

**[24]** This application falls within s. 274(1)(a) CA as this application seeks the winding up court's determination on a question as to whether the winding up court may grant leave to the liquidator to wind up the vendor's affairs and to call for the final meeting irrespective of whether the transfer of the three lots has been registered or not.

**[25]** Under s. 274(2) CA, the winding up court "may make such other order on the application as it thinks just". I have earlier given my reasons to dismiss this application with liberty to apply. It is only just that costs of this application be borne by BMMB because if BMMB has not been guilty of excessive delay in executing Form 14A by using the PA's in question, it is not necessary for the liquidator to file this application in respect of Lots 39 and 42. Accordingly, I award a sum of RM5,000 as costs of this application to be paid by BMMB to the liquidator.

**Court's Decision**

**[26]** In the light of the above reasons, this court makes the following order:

(a) This application is dismissed with liberty to the liquidator to apply as the liquidator sees fit after all the vendor's affairs have been fully wound up; and

(b) costs of RM5,000 should be paid by BMMB to the liquidator because BMMB has been guilty of unreasonable delay in executing Forms 14A for Lots 39 and 42 by using the relevant PA's.